Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J–02–368 OF 1994
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
9 APRIL 1997

Companies and Corporations — *Winding up — Just and equitable rule — Allegation of a quasi-partnership between petitioner and two of the main shareholders of the company — Whether the company was a quasi-partnership company — Whether company should be wound up — Companies Act 1965 s 218(i)*

Companies and Corporations — *Winding up — Just and equitable rule — Exclusion from management — Petitioner claimed that he was excluded from management of company — Proposed resolution to remove petitioner as director — Allegation of exclusion from management disputed by shareholders — Whether company should be wound up — Companies Act 1965 s 218(i)*

Companies and Corporations — *Winding up — Just and equitable rule — What is considered to be a just and equitable ground to wind up a company — Companies Act 1965 s 218(i)*

This was an appeal against the decision of the High Court judge, who ordered that the seventh appellant company ('the company') be wound up upon the petition of the respondent, who was a shareholder and director of the company at all material times.

The respondent claimed that a quasi-partnership existed between the respondent, the first appellant and the second appellant, who represented the main shareholders of the company. The respondent also claimed that he was excluded from the management of the company around May 1991. He contended that the appellants had attempted to remove and would have him removed as director if not restrained by an ex parte injunction order obtained by the respondent in August 1992. It was argued that this was evidence not only of the appellants' intention to exclude the respondent from management participation but also it was evidence of the breakdown in confidence and personal relationship between the parties.

The appellants disputed the question of quasi-partnership and contended that the company had been run according to its memorandum and articles of association. Further, the appellants in their respective affidavits seriously disputed the allegation of the respondent that he was excluded from management around May 1991. The first appellant's affidavit exhibited copies of resolutions signed by the respondent to show that he was never excluded from management. Counsel for the appellants submitted that since the respondent was appointed a director in 1984, he had never been removed as a director. He submitted that to be excluded from management, the respondent must show that he had been removed as a director.

The parties did not adduce oral evidence and the judge did not order any oral evidence to be taken to resolve any material dispute. The two principal issues for determination at the trial were whether: (i) the company was a quasi-partnership company; and (ii) the petitioner was excluded from management of the company from May 1991. The judge found both issues in favour of the respondent and ordered that the company be wound up under the just and equitable rule, hence this appeal by the appellants.

Held, allowing the appeal:

(1) Looking at the entire affidavit evidence filed in these proceedings, it was clear that the allegation of the respondent that the company was a quasi-partnership had been credibly denied or otherwise seriously disputed by his two alleged quasi-partners, and by the other two directors and shareholders. In such a situation, the only way to resolve the dispute is the calling of the deponents of the affidavits for examination and cross-examination, where their credibility can be tested and assessed, and when the judge has the advantage of seeing the witnesses and observing their demeanour, bearing in mind that the burden of proving his case lies on the petitioner. The judge was wrong in deciding the issue of quasi-partnership on disputed facts in favour of the respondent, when the undisputed facts did not prove quasi-partnership (see p 201B–D).

(2) From the undisputed evidence, the allegation by the respondent that he was excluded from the management of the company around May 1991 was totally unfounded. He was never removed as director from the day of his appointment in 1984 up to the hearing of this appeal. He had participated in the management of the company by attending the board meetings and signing resolutions before and after May 1991. The court was unable to comprehend how — in the face of the undisputed evidence — the respondent could claim that he had been excluded from management in the company.

Further, a proposed resolution to remove a director could not be equated with his actual removal. The appellants dutifully complied with the ex parte injunction order and never removed the respondent as a director. The natural consequence was that the respondent was at all material times not excluded from management. The judge erred in law and fact in holding that the respondent was excluded from management when the undisputed evidence showed that he was a director and had actually participated in the management at all material times. The judge misdirected himself in finding that the respondent would have been removed if not for the injunction order (see pp 204G–I and 205C–D).

Obiter:

(1) If the court was wrong in its primary opinion, there was ample evidence on record to find that it was not just and equitable to wind up the company for the reasons which were stated in the written submissions of counsel for the appellants, which the judge had not considered adequately.

Whether to wind up a company on the just and equitable rule was a matter of judicial discretion to be exercised on what was just and equitable, having regard to the circumstances of the case and the interest of all the shareholders (including the petitioner) and the company.

In the present case, the court had borne in mind that it would be very drastic to wind up the company. All the other shareholders did not want to wind up the company. There were no creditors supporting the petition. The company was a very profitable and successful going concern. There were also no allegations of mismanagement or misuse of the company's funds. There was therefore no reason to wind up the company (see pp 206B–D, I and 207A, F); *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 followed and *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314 distinguished.

(2) A petitioner who comes to court to wind up a company on the just and equitable rule must always come with clean hands. Considering the fact that the respondent had suppressed the material evidence relating to his actual participation in the management of the company, the court was of the opinion that the respondent had not come to court with clean hands to justify the winding up of the company on the just and equitable rule (see pp 206C–D and 207E); *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 followed.

[Bahasa Malaysia summary

Ini merupakan suatu rayuan terhadap keputusan hakim Mahkamah Tinggi, yang memerintahkan supaya syarikat perayu ketujuh ('syarikat tersebut') digulung atas petisyen penentang, yang merupakan seorang pemegang saham dan pengarah syarikat tersebut pada semua masa material.

Penentang menuntut bahawa suatu separa perkongsian wujud di antara penentang, perayu pertama dan perayu kedua, yang mewakili pemegang saham utama syarikat tersebut. Penentang juga menuntut bahawa dia telah dikecualikan daripada pengurusan syarikat tersebut kira-kira sekitar bulan Mei 1991. Dia berhujah bahawa perayu-perayu telah cuba dan berniat memecatnya sebagai pengarah jika tidak ditahan oleh suatu perintah injunksi ex parte yang diperolehi oleh penentang pada bulan Ogos 1992. Ia dihujahkan bahawa ini adalah bukti bukan sahaja tentang tujuan perayu-perayu untuk mengecualikan penentang daripada penyertaan dalam pengurusan tetapi dan ia adalah

juga bukti tentang kemerosotan dalam keyakinan dan perhubungan peribadi antara pihak-pihak.

Perayu-perayu mempertikaikan persoalan separa perkongsian dan berhujah bahawa syarikat tersebut telah dikendalikan menurut memorandum dan perkara-perkara persatuan. Selanjutnya, perayu-perayu dalam afidavit masing-masing mempertikaikan secara serius pengataan penentang bahawa dia dikecualikan daripada pengurusan sekitar bulan Mei 1991. Afidavit perayu pertama mempamerkan salinan resolusi yang ditandatangani oleh penentang untuk menunjukkan bahawa dia tidak pernah dikecualikan daripada pengurusan. Peguam untuk perayu-perayu berhujah bahawa sejak penentang dilantik sebagai pengarah dalam tahun 1984, dia tidak pernah dipecat sebagai pengarah. Beliau berhujah bahawa untuk dikecualikan daripada pengurusan, penentang mesti menunjukkan bahawa dia telah dipecat sebagai seorang pengarah.

Pihak-pihak tidak mengemukakan keterangan lisan dan hakim tidak memerintahkan sebarang keterangan lisan diambil bagi menyelesaikan sebarang pertikaian material. Dua isu utama untuk penentuan di perbicaraan adalah sama ada: (i) syarikat tersebut adalah syarikat separa perkongsian; dan (ii) pempetisyen dikecualikan daripada pengurusan syarikat tersebut mulai bulan Mei 1991. Hakim mendapati kedua-dua isu memihak kepada penentang dan memerintah bahawa syarikat tersebut digulung di bawah rukun adil dan saksama, oleh itu perayu-perayu membuat rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Dengan mempertimbangkan keterangan afidavit yang difailkan dalam prosiding ini secara keseluruhan, adalah jelas bahawa pengataan penentang bahawa syarikat tersebut adalah separa perkongsian telah dinafikan atau sebaliknya dipertikaikan secara serius oleh dua separa kongsi yang dikatakan, dan oleh dua pengarah dan pemegang saham yang lain. Dalam keadaan sedemikian, satu-satunya cara untuk menyelesaikan pertikaian adalah dengan memanggil saksi-saksi sumpah afidavit untuk penelitian dan pemeriksaan balas, di mana kebolehpercayaan mereka boleh diuji dan ditaksir, dan apabila hakim berpeluang melihat saksi-saksi dan memerhatikan perilaku mereka, dengan mengingati bahawa beban membukti kes terletak pada pempetisyen. Hakim adalah salah dalam menentukan isu separa perkongsian atas fakta yang dipertikaikan memihak kepada penentang, padahal fakta yang tidak dipertikaikan tidak membuktikan separa perkongsian (lihat ms 201B–D).

(2) Dari keterangan yang tidak dipertikaikan, pengataan oleh penentang bahawa dia dikecualikan daripada pengurusan syarikat tersebut sekitar bulan Mei 1991 tidak berasas langsung. Dia tidak pernah dipecat sebagai pengarah sejak hari pelantikan dalam tahun 1984 sehingga pembicaraan rayuan ini. Dia telah menyertai pengurusan syarikat tersebut dengan menghadiri mesyuarat

lembaga dan menandatangani resolusi sebelum dan selepas bulan Mei 1991. Mahkamah tidak dapat memahami bagaimana — dengan adanya keterangan yang tidak dipertikaikan — penentang boleh menuntut dia telah dikecualikan daripada pengurusan syarikat tersebut. A

Seterusnya, suatu resolusi yang dicadangkan untuk memecat pengarah tidak boleh disamakan dengan pemecatan sebenarnya. Perayu-perayu telah mematuhi perintah injunksi ex parte dan tidak memecat penentang sebagai seorang pengarah. Akibatnya adalah bahawa penentang tidak dikecualikan daripada pengurusan pada semua masa material. Hakim melakukan kesilapan undang-undang dan fakta dalam memutuskan bahawa penentang dikecualikan daripada pengurusan apabila keterangan yang tidak dipertikaikan menunjukkan bahawa dia adalah seorang pengarah dan memang telah menyertai pengurusan di semua masa material. Hakim telah salah arah dalam membuat keputusan bahawa penentang akan dipecat jikalau perintah injunksi itu tidak dibuat (lihat ms 204G–I dan 205C–D). B C D

Obiter:

(1) Jika mahkamah adalah salah dalam pendapat primer, terdapat keterangan yang lebih dari cukup atas rekod untuk mendapati bahawa adalah tidak adil dan saksama untuk menggulung syarikat tersebut atas alasan yang dinyatakan dalam hujah bertulis peguam perayu-perayu, yang tidak dipertimbangkan dengan wajar oleh hakim. E

Sama ada untuk menggulung sesebuah syarikat atas rukun adil dan saksama merupakan suatu perkara budi bicara kehakiman untuk dilaksanakan atas apa yang adil dan saksama, dengan mengambil kira keadaan kes dan kepentingan kesemua pemegang saham (termasuk pempetisyen) dan syarikat itu. F

Dalam kes ini, mahkamah telah mengingati bahawa adalah amat drastik jika syarikat tersebut digulung. Kesemua pemegang saham yang lain tidak ingin menggulung syarikat tersebut. Tiada si piutang yang menyokong petisyen ini. Syarikat tersebut merupakan sebuah syarikat yang amat menguntungkan dan berjaya. Juga tiada terdapat sebarang pengataan salah pengurusan atau pun penyalahgunaan wang syarikat tersebut. Oleh yang demikian, tiada sebab untuk menggulung syarikat tersebut (lihat ms 206B–D, I dan 207A, F); *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 diikut dan *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314 dibeza. G H

(2) Pempetisyen yang datang ke mahkamah untuk menggulung sesebuah syarikat atas rukun adil dan saksama mestilah sentiasa berbuat demikian 'dengan tangan yang bersih'. Memandangkan fakta bahawa penentang telah menyekat keterangan material berhubung dengan penyertaan sebenarnya dalam pengurusan I

A syarikat tersebut, mahkamah berpendapat bahawa penentang tidak 'menghadapi mahkamah dengan tangan yang bersih' bagi memberi justifikasi kepada penggulungan tersebut atas rukun adil dan saksama (lihat ms 206C–D dan 207E); *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 diikut.]

B **Notes**

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

C *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (folld)
Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd [1989] 2 MLJ 369 (refd)
Goodwealth Trading Pte Ltd, Re [1991] 2 MLJ 314 (distd)
Kok Fook Sang v Juta Vila (M) Sdn Bhd [1996] 2 MLJ 666 (refd)
D *Kong Thai Sawmill (Miri) Sdn Bhd, Re* [1978] 2 MLJ 227 (folld)
Kwong On Co Ltd, Re [1948–49] MLJ Supp 137 (refd)
Lo Siong Fong, Re [1994] 2 MLJ 72 (refd)
Loch v John Blackwood Ltd [1924] All ER Rep 200 (refd)
Lundie Brothers Ltd, Re [1965] 2 All ER 692 (refd)
E *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (refd)

Legislation referred to

Companies Act 1965 ss 131, 181, 218(i)
Rules of the High Court 1980 O 45 r 7

F **Appeal from**: Company Winding-Up No 28–69 of 1992 (High Court, Johor Bahru)

Wong Kim Fatt (*Hong Chin Heng* with him) (*Gulam & Wong*) for the appellants.

G *M Nagarajah* (*Teng Chong Mei* with him) (*Shook Lin & Bok*) for the respondent.

Mokhtar Sidin JCA (delivering the judgment of the court): We have unanimously allowed the appeal with costs and we now give our reasons for so doing.

H This is an appeal against the decision of the learned High Court judge, who by order dated 28 November 1994, wound up the seventh appellant company, River View Properties Sdn Bhd ('the company') upon the petition dated 11 August 1992 of the respondent, Mr Lim Mong Sam, who was and is a shareholder and director of the company at all material I times. The first four appellants are individual shareholders and directors of the company, while the fifth and sixth appellants are corporate shareholders of the company. The two principal issues for determination are:

(1) whether the company is a quasi-partnership company; and

(2) whether the petitioner was excluded from management of the company from May 1991.

The learned judge found both the issues in favour of the respondent and ordered the company be wound up under the just and equitable rule, and hence this appeal by the seven appellants.

To understand the case properly, it is necessary to relate briefly the history of the company from the undisputed facts as stated in paras 1–13 of the petition. On 17 May 1980, the company was incorporated with a paid-up capital of RM2, with the first appellant, Mr Yai Yen Hon, and his wife, Madam Wong Quai Yin (the third appellant), as the first directors, holding one subscriber share of RM1 each. The authorized capital of the company is RM5m divided into 5m shares of RM1 each. The paid-up capital is now RM2,400,000. Among the objects of the company are the purchase of and dealing in movable and immovable property. Paragraph 6 of the petition reads as follows:

> 6 On or about March 1982, the shareholdings of the company were as follows:
>
> | | |
> |---|---|
> | Yai Yen Hon | 100,999 |
> | Wong Quai Yin | 1 |
> | Harta Kumpulan Sdn Bhd | 154,000 |
> | Lim Mong Sam | 39,000 |
> | Shaikh Mohd Bin Tahir | 12,000 |
> | Lim Hua Seng | 48,000 |
> | Heng Lin Pong | 48,000 |
> | Ang Leck Keng | 48,000 |
> | Tan Chong Bok | 150,000 |
> | Total shares | 600,000 |

A bonus issue of three for one share was declared in 1982. In 1983, there were ten shareholders, when Poi Tee Holdings Sdn Bhd became a new shareholder, and the shareholdings, according to para 8 of the petition, were then as follows:

Yai Yen Hon	284,000
Wong Quai Yin	300,000
Harta Kumpulan Sdn Bhd	316,000
Lim Mong Sam (the respondent)	156,000
Tan Chong Bok	500,000
Lim Hua Seng	192,000
Heng Lin Pong	192,000

Ang Leck Keng	192,000
Poi Tee Holdings Sdn Bhd	220,000
Shaikh Mohd Bin Tahir	48,000
Total shares	2,400,000

In 1984, following a circular resolution signed by a majority of the directors, the respondent and the second appellant, Mr Ng Kam Loon, were appointed as the new directors of the company. As at 18 January 1985, the company had 13 shareholders of different shareholdings. Out of the 13 shareholders, four of them are private limited companies. As at 20 May 1990, the 13 shareholders of different shareholdings remained except that the shareholdings percentage had differed. The appellants did not dispute paras 12 and 13 of the petition which read as follows:

> 12 The shareholders in the company are essentially controlled as follows:
>
> | | |
> |---|---|
> | Yai Yen Hon | 38.78% |
> | Ng Kam Loon | 12.99% |
> | Shaikh Said Bin Shaikh Mohd | 3.67% |
> | Pol Tee Holdings Sdn Bhd | 9.17% |
> | Lim Mong Sam (the petitioner) | 35.39% |
>
> 13 The present directors of the company are as follows:
>
> (a) Yai Yen Hon: the Managing Director ('YYH')
>
> (b) Sheikh Mohd Bin Tahir
>
> (c) Wong Quai Yin
>
> (d) Ng Kam Loon ('NKL')
>
> (e) Lim Mong Sam ('the petitioner')
>
> The above members have always been the directors of the company since 1984.

It was contended by the respondent that there exists a quasi-partnership. However, the appellants disputed the question of quasi-partnership and the allegations in para 14 of the respondent's petition in which he claimed quasi-partnership with two of the shareholders, ie Mr Yai and Mr Ng. We reproduce para 14 below:

> 14 After 1984, the company is thus essentially owned by Yai Yen Hon, Ng Kam Loon and your petitioner. In substance, a quasi-partnership between Yai Yen Hon, Ng Kam Loon and your petitioner.

In his judgment, the learned judge was of the view that in respect of personal relationship and mutual confidence between the shareholders of the company, the minority shareholders can be ignored. The learned judge said at p 9 of his judgment:

> It was submitted that there existed a personal relationship and mutual confidence between the shareholders of the company and especially between

> LMS, YYH and NKL who represent the main shareholders of the company. In my view, it is not necessary for LMS to show such relationship in respect of all the shareholders of the company as the other shareholders are minor ones or nominees or subsidiary companies of the company as Mr Wong seemed to submit that LMS must show (see element (ii) of *Ebrahimi*'s case at p 379 [*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360]).

With respect, we are unable to agree with the view of the learned judge that the minority shareholders can be ignored in a company, be it a quasi-partnership company or not. The minority shareholders in the company are Shaikh Said bin Shaikh Mohd holding 3.67% and a private limited company called Poi Tee Holdings Sdn Bhd holding 9.17% in the equity of the company. The respondent did not claim them to be his quasi-partners. We wonder how one individual shareholder can establish a personal relationship or quasi-partnership with a corporate shareholder. The appellants contended that the company has been run according to its memorandum and articles of association. Element (ii) in the judgment of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (at p 500) did not say that the minority shareholders in a company could be ignored. If the interest of the minority shareholders is ignored, they would be entitled to file a petition for remedies for oppression under s 181 of the Companies Act 1965 ('the Act'), but the present case is not one on oppression but on quasi-partnership and exclusion from management. In *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, the House of Lords reversed the decision of the English Court of Appeal ([1971] 1 All ER 561) and restored the judgment of Plowman J who allowed the petition to wind up Westbourne Galleries Ltd on the just and equitable rule ([1970] 3 All ER 374). In that case, Ebrahimi, the appellant petitioner, was one of the three shareholders in that company, which was formed in 1958 to take over a business previously carried on by the appellant and one Nazar as partners and they shared the management and profits equally. When the company was formed, they were each issued with 500 shares of £1 each. The problem started after Nazar's son, George Nazar, was appointed a director, and the appellant and Nazar each transferred 100 shares to George Nazar. On 12 August 1969, at a general meeting of the company, an ordinary resolution was passed by Nazar and his son removing the appellant as a director of the company, leading to the presentation of Ebrahimi's petition.

Westbourne Galleries' case was recently considered by our Court of Appeal in *Kok Fook Sang v Juta Vila (M) Sdn Bhd* [1996] 2 MLJ 666. In dismissing the appeal of the petitioner/appellant, Mahadev Shankar JCA said at p 673:

> Put shortly, what it means is this, where a company is in substance an incorporated partnership, a winding-up order may be made (under the just and equitable rule) in situations where a partnership may be dissolved by the court. But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding-up order to be made under the rule as the use of the partnership analogy is no longer valid.

A In the instant case, the petitioner asks for the company to be wound up merely because it is in substance an incorporated partnership. But that is not enough. For a winding-up order under the just and equitable rule to be made, in the case of a partnership like company, there must be shown situations where a partnership may be dissolved by the court. None are shown in the petition.

B Juta was incorporated on 21 November 1991. The authorized capital was RM5m. The issued capital was RM1,857,000. Kok claims in the petition that he held 75,710 shares in his own name and that one Kok Kim Sang held 68,050 shares as his nominee. He also claims that he, the second respondent ('Yeoh') and the third respondent ('Chin') operated the company as if it were a partnership.

C Yeoh and Chin have challenged these allegations. They say the company is not a partnership, that there are eight shareholders, and that Kok's alleged beneficial shareholding in Juta is under challenge in Ipoh High Court Civil Suit No 22–115–94. In any case, his 75,710 shares only gives him a nominal 4.08% of Juta.

D In the present appeal before us, we note that the company was incorporated by Mr Yai and his wife in 1980 not for the purpose of taking over any partnership business carried on by them. In 1983, the respondent became a shareholder of the company and later in 1984 became a director. Under art 9 of the company's articles of association, trust is not recognized. The number of shareholders increased from the two original subscribers in E 1980 to as many as 13 in 1990, including four corporate shareholders, each with different shareholdings. Mr Yai, Mr Ng, Madam Wong and Tuan Shaikh Said, who were all directors and shareholders of the company, had seriously disputed in their respective affidavits the claim of quasi-partnership by the respondent. They had also disputed the agreement or F understanding as alleged by the respondent. They contended that the company was managed according to its memorandum and articles of association. In this regard, we need only refer to two of the affidavits. In his affidavit of 3 October 1992, Mr Ng stated in para 4 thereof (at p 193 of the appeal record ('the AR')) as follows:

G From 9 August 1984, the date on which the petitioner and I were appointed as directors of the company, the company was never run as a quasi-partnership as alleged by the petitioner. I affirm that there never existed any such quasi-partnership between Yai Yen Hon (the first respondent), myself and the petitioner or any other director of the company. Neither was there any agreement (written or oral), intentions, understanding or obligation for H such an arrangement.

In reply to the respondent's para 14 above, Mr Yai in para 4(1)–(3) of his lengthy affidavit (at pp 258–278 of the AR) dated 2 January 1993 seriously disputed the respondent's claim to quasi-partnership. We need only refer to para 4(3)(a)–(h) (at pp 259–260 of the AR) of that affidavit reading as I follows:

4(3) I say that this allegation of a quasi-partnership is frivolous, and can be conclusively disproved by the following facts:

(a) The company was incorporated on 17 May 1980.

(b) At the date of incorporation, my wife, Madam Wong Quai Yin (the third respondent), and I (the first respondent) were the sole subscribers and directors.

(c) Sometime in or around 1982, I invited several parties (including the petitioner) to invest in the company, which they duly did, and they became shareholders in the company. At the same time in 1982, I invited several of these parties to become directors of the company. The petitioner, however, was not one of those invited to be a director of the company in 1982.

(d) As of 25 January 1984, there were six directors, namely:

(i) Yai Yen Hon @ Chua Yen Hon (myself)

(ii) Wong Quai Yin (the third respondent)

(iii) Tan Chong Bok

(iv) Lim Hua Seng

(v) Shaikh Mohamed bin Tahir

(vi) Shaikh Sharufuddin bin Sheik Mohd.

(e) On 9 August 1984, the petitioner and Ng Kam Loon (the second respondent) accepted the company's invitation to become directors, and both the petitioner and the second respondent were duly elected as directors.

(f) Shaikh Sharufuddin bin Mohd and Tan Chong Bok resigned as directors on 4 September 1984 and 12 September 1984 respectively, thereby leaving a total of five directors.

(g) The abovenamed changes in the composition of the board of directors refute the petitioner's allegation of a quasi-partnership.

(h) Moreover, at no time during my association with the petitioner, did the petitioner mention or aver that the company was a quasi-partnership, and should be run as such.

A total of some 15 affidavits was filed in these proceedings, 11 for the appellants and four for the respondent. The hearing of the petition proceeded before the learned judge on the disputed affidavit evidence on whether the company is a quasi-partnership company. Several agreed bundles of documents were also filed, and the appeal record runs into four volumes. The Act does not define what a quasi-partnership company is. A quasi-partnership company, although incorporated under the Act, is run like a partnership in which there is an agreement or underlying obligation for the directors to participate in the management of the quasi-partnership company. In as much as a partnership may be dissolved by the court under the just and equitable rule, that company may be similarly wound up if the petitioner shows that it is just and equitable to do so. The parties in the present case did not adduce oral evidence and the learned judge did not order any oral evidence to be taken to resolve any material dispute. He sought to resolve this serious dispute by applying the principle in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433. At p 4 of his judgment, the learned judge said:

> In the event of both parties opting not to call oral evidence or to cross-examine the deponents on their affidavits, the principle in the Privy Council

A decision of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 applies, where at p 433 (para (3) of the holding of the court), it is stated:

> 'if allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by
B consideration of the undisputed facts.'

Looking at the entire affidavit evidence filed in these proceedings, we are of the view that the allegation of the respondent that the company was a quasi-partnership had been credibly denied or otherwise seriously disputed by his two alleged quasi-partners, Mr Yai and Mr Ng, and by the other two
C directors and shareholders, ie Madam Wong and Tuan Shaikh Said. In such a situation, the only way to resolve the dispute is the calling of the deponents of the affidavits for examination and cross-examination, where their credibility can be tested and assessed, and when the judge has the advantage of seeing the witnesses and observing their demeanour, bearing
D in mind that the burden of proving his case lies on the petitioner. With respect, the learned judge had applied the principle wrongly because he decided the issue of quasi-partnership on disputed facts in favour of the respondent, when the undisputed facts do not prove quasi-partnership.

We agree with Mr Wong Kim Fatt, learned counsel for the appellants, that the involvement of Mr Yai, Mr Ng and the respondent in several other
E companies is irrelevant as these companies are not the subject of any winding-up proceedings. The court is only concerned with River View Properties Sdn Bhd, the seventh appellant. A similar situation arose in *Kok Fook Sang v Juta Vila (M) Sdn Bhd*, in which Mahadev Shankar JCA said at p 672:

F
> Since the court here was concerned with Juta Vila (M) Sdn Bhd ('Juta'), the allegations Kok has made in the petition with regard to his problems with some other businesses called Firenze Enterprise, Plus Parade Sdn Bhd and Globeplex (M) Sdn Bhd were irrelevant.

On the board resolutions passed by a majority of directors, Mr Wong
G contended that the learned judge had erred in his finding of fact. At p 11 of his judgment (p 45 of the AR), the learned judge said:

> (iii) Unanimous decisions
>
> Mr Wong Kim Fatt in submission sets out a number of decisions and circular resolutions that were not unanimous but they were all made or
H done before LMS became a director and increased his investment. Mr Wong seemed to harp on the point that all decisions were made in accordance to the articles of association of the company, that is, by majority decision.

In his written and oral submissions before us and in his written submissions
I before the learned judge, Mr Wong had clearly shown, and it was not disputed, that there was at least a dozen board resolutions which were passed by majority *before* the respondent was appointed a director in 1984 and there was at least another dozen board resolutions which were passed by majority *after* his appointment as a director. The learned judge had

erred in fact in relying on 'the unanimous issue' of board resolutions as a ground for finding quasi-partnership in favour of the respondent. Before leaving the subject of quasi-partnership, we would like to state that failure or ceasure by Mr Yai to be a frequent visitor to the respondent's office is no ground for winding up the company. In this connection, and with regard to the lack of confidence in the conduct and management of the affairs of the company, it is appropriate to note the observations of Lord Shaw in the Privy Council case of *Loch v John Blackwood Ltd* [1924] All ER Rep 200 at p 263:

> It is undoubtedly true that at the foundation of applications for winding up on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound up.

Even if the respondent had crossed the first hurdle of quasi-partnership, he had to clear another hurdle of exclusion from management before a consideration can arise as to whether the company should be wound up under the just and equitable rule. The respondent's claim to exclusion from management of the company around May 1991 is to be found in para 25 of his petition. However, for a better picture of the respondent's claim, we quote below paras 23–25 of his claim:

> 23 Your petitioner has been a director of the company since 1984, at which time it was agreed that the running of the company would be based on good faith and confidence and that all members of the board of directors would participate in the decisions and undertakings of the board of directors.
>
> 24 Your petitioner also contends that the basis of association and understanding amongst the members of the board of directors is one of personal trust, good faith, mutual confidence and full disclosure. There exists an underlying obligation and understanding that all members of the board are entitled to participate in the decision-making process of the company.
>
> 25 Around May 1991, the relationship amongst the directors-cum-shareholders in the company referred to in paras 23 and 24 hereinabove began to deteriorate, from which point in time your petitioner had been excluded from the management and decision-making process of the company.

In reply, the first three appellants in their respective affidavits seriously disputed the allegation of the respondent that he was excluded from management around May 1991. We need only refer to Mr Yai's affidavit of 2 January 1993, in which he exhibited copies of resolutions signed by the respondent to show that he was never excluded from management. Paragraph 8 of that affidavit reads as follows:

A 8(1) I deny para 25 of the petition. Since the petitioner was appointed as a director of the company in 1984, every opportunity had been made available to him in that notices of board meetings and general meetings had been sent to him and any circular resolutions to be signed was made known to him and therefore the petitioner had never been excluded from the management and decision making
B process of the company as claimed by him.

8(2) This is evidenced by his attendance in all annual general meetings, extraordinary general meetings and all board of directors' meetings. The petitioner had also signed all the directors' circular resolutions right up to 15 April 1992. The records of the petitioner's active participation in the management and decision-making of the company
C since May 1991 were extracted from the company's minutes book and are now produced and marked collectively as exhibit 'YYH-1'. The petitioner signed his signature above his name 'Lim Mong Sam @ Lim Ah Tee'. I also participated in all the above meetings and signed the circular resolutions as evidenced from my signature above my name 'Yai Yen Hon @ Chua Yen Hon'. The petitioner is
D therefore misleading this honourable court in saying that he was excluded from the management of the company 'around May 1991'.

In his written submission to the learned judge, Mr Nagarajah Muttiah, learned counsel for the respondent, stated as follows:

E The respondents submit at p 15 paras 13 and 14 that the petitioner has *never* been removed as a director of the company, and as such, has never been excluded from management participation. The petitioner re-states that the respondents had attempted to and would have him removed as director if not restrained by the order of court granted on 23 August 1992. Not only is this evidence of the respondents' intention to exclude the petitioner from management participation but also evidence of the breakdown
F in confidence and personal relationship between the parties.

The learned judge agreed with Mr Nagarajah that if the respondent had not obtained the ex parte injunction order of 23 August 1992, he would have been removed as a director. In our judgment, a proposed resolution to remove a director in the EGM cannot be equated with his actual
G removal. Paragraph (1) of that injunction order had stopped the extraordinary general meeting fixed for 29 August 1992 to decide whether the respondent should be removed as a director. Under para (2) of the injunction order, all the appellants were restrained 'from removing or attempting to remove the petitioner as director' of the company. There is
H also an indorsement under O 45 r 7 of the Rules of the High Court 1980 giving warning of contempt of court in the event of disobedience to the order.

Learned counsel for the appellants, Mr Wong Kim Fatt, contended that since the respondent was appointed a director in 1984, he has never
I been removed as a director. At the hearing of this appeal before us on 22 January 1997, Mr Nagarajah confirmed that the respondent was still a director of the company. Mr Wong submitted that to be excluded from management, the respondent must show that he had been removed as a director. He drew our attention to art 104 of the company's articles of

association, which provides that the 'management of the business of the company shall be vested in the directors'. Under art 94, the respondent as a director may at any time convene a meeting of the directors, and art 93 provides that two directors shall form a quorum and that questions shall be decided by a majority of votes.

In considering the respondent's alleged exclusion from management around May 1991, we need only refer to para 8 of Mr Wong's written submissions to us dated 13 January 1997 where learned counsel referred to evidence of the respondent's participation:

> 8 The evidence further clearly shows that even after his own alleged exclusion from management from May 1991, he continued to participate in the company's management by actively participating in the board meetings and board resolutions of the company as evidenced as follows:
>
> (i) On 7 June 1991, ie after his alleged exclusion date as from May 1991, the respondent signed the circular resolution approving a second interim dividend of 25%.
>
> (ii) On 8 June 1991, the respondent signed another circular resolution approving transfer of 110,000 shares from Shaikh Sharufuddin to the second appellant.
>
> (iii) On 31 October 1991, the respondent signed two circular resolutions, one fixing the EGM and the other approving the site expenses of RM20,600.
>
> (iv) On 16 November 1991, he actively participated in the company's EGM.
>
> (v) On 17 December 1991, he signed a circular resolution for the purchase of land.
>
> (vi) On 1 January 1992, he participated in the EGM as a director/shareholder.
>
> (vii) He continued to participate in the management of the company and decision-making process by signing circular resolutions.
>
> (ix) On 26 March 1992 and 25 July 1992, he attended the directors' meetings.

We find that from the above undisputed evidence, the allegation by the respondent that he was excluded from the management of the company around May 1991 is totally unfounded. He was never removed as director from the day of his appointment in 1984 up to the hearing of this appeal. He had participated in the management of the company by attending the board meetings and signing resolutions before and after May 1991. We are unable to comprehend how, in the face of the above undisputed evidence, the respondent could claim that he had been excluded from management in the company. The respondent's participation in the above resolutions and meetings was within his own personal knowledge. He had withheld the above material evidence from the court in his petition and affidavits. If the respondent's claim that he was excluded from management around May 1991 is true, there would indeed be no necessity for him to obtain in the following year the ex parte injunction order of 23 August 1992 to restrain his removal as a director. That order also contradicts his allegation

that he was excluded earlier from management around May 1991. If he had wanted to base his petition on exclusion, he should have allowed himself to be removed first. As events turned out, by his own act, he pre-empted his removal and he cannot be allowed to take unfair advantage of his injunction order to the prejudice of the appellants. At p 19 of his judgment, the learned judge said:

> Without having to repeat, in my view, the facts had been shown and set out clearly of the exclusion of LMS from management participation in the company.

With respect, we are unable to agree with his conclusion in the light of the above undisputed evidence. The appellants dutifully complied with the court order and never removed the respondent as a director. The natural consequence is that the respondent was at all material times not excluded from management. With respect, the learned judge erred in law and fact in holding that the respondent was excluded from management when the undisputed evidence shows that he was a director and had actually participated in the management at all material times. The learned judge misdirected himself in finding that the respondent would have been removed if not for the injunction order.

In several leading cases in which there was an obligation to allow the petitioner to participate in the management, the petitioner was removed as a director and consequently excluded from management. These cases are *Re Lundie Brothers Ltd* [1965] 2 All ER 692, *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 and *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433. In these cases, petitions were presented *after* the petitioners were removed as directors.

A director, however, can be removed for a just cause. In *Re Lo Siong Fong* [1994] 2 MLJ 72, the petitioner was removed as managing director of the company, Federal Paints Factory Sdn Bhd, the business of which was in effect carried on as a partnership. The petitioner sought to wind up Federal Paints on the just and equitable rule under s 218(1) of the Act. He had earlier obtained an ex parte order to place Federal Paints in the hands of provisional liquidators. VC George J (as he then was) held that the removal of the petitioner as managing director was justified in a commercial sense because under his management, the company has accumulated high losses. In that case, the learned judge set aside the appointment of the provisional liquidators and ordered a permanent stay of the petition. He said at p 80:

> Such accounts of the company as were before the court show that although in 1992 the company made a profit, during the regime with the petitioner at the helm, the company had in fact accumulated losses that amounted to over RM2m by 1992. ... The track record of Federal Paints with the petitioner as managing director shows that there has been an alteration of the circumstances from the position that obtained before the management of the company fell into the petitioner's hands and that record puts paid to the suggestion that has been made that the applicants were being unfair in trying to get rid of the petitioner and lends support to the contention that

> the applicants in any event were justified in a commercial sense in getting rid of him. A

On the two principal issues of quasi-partnership and exclusion from management, we are of the view that the learned judge should have dismissed the petition with costs. If we are wrong in our primary opinion, we are of the view that there is ample evidence on the record for us to find B that it is not just and equitable to wind up the company for the reasons which were stated in para 18(a)–(d) of the written submissions of Mr Wong Kim Fatt to the learned judge, who had not considered them adequately. In our opinion, whether to wind up a company on the just and equitable rule is a matter of judicial discretion to be exercised on what is just and equitable, having regard to the circumstances of the case and the C interest of all the shareholders (including the petitioner) and the company. It must be remembered that a petitioner who comes to court to wind up a company on the just and equitable rule must always come with clean hands. As Lord Cross of Chelsea said in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at p 507: D

> A petitioner who relies on the just and equitable clause must come to court with clean hands.

Murray-Ansley CJ in *Re Kwong On Co Ltd* [1948–49] MLJ Supp 137 refused to wind up the company concerned even assuming it were a case where partnership rule applied. In *Foo Yin Shung & Ors v Foo Nyit Tse & E Brothers Sdn Bhd* [1989] 2 MLJ 369, Peh Swee Chin J (as he then was) refused to exercise his discretion to wind up the company under the just and equitable clause in s 218(1)(i) of the Act. Lord Wilberforce, in making his observation on the discretion of the court to wind up a company under s 181(2)(e) of our Companies Act, cautioned as follows in *Re Kong Thai* F *Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at p 233:

> In exercising this discretion, the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern.

In the Singapore case of *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314 G cited by the learned judge in his judgment, the facts are totally different from those in the present appeal. In that case, the company had ceased to carry on its restaurant business and its substratum had disappeared. It was in arrears of its monthly rent. The two parties could no longer work together and were not even on speaking terms. Yong Pung How CJ, in allowing the petition to wind up the company, said at p 320: H

> For a court to refuse to order a winding up and in effect force the warring parties to continue in partnership, when, as in the present case, it is clear that the parties can no longer work together, would merely be to endorse an exercise in futility.

I

In the present case, we have borne in mind that it would be very drastic to wind up the company. All the other shareholders did not want to wind up the company. There were no creditors supporting the petition. The company is a very profitable and successful going concern. There were no allegations

of mismanagement or misuse of the company's funds. For the year ended 31 October 1990, it is not in dispute that the company made a huge profit of RM2,884,005, and the respondent himself signed the accounts. The company also paid good dividends in 1991 and the respondent received director's fee of RM20,000 per year each in 1991 and 1992. There was a serious allegation against the respondent, and not denied by him, that he had committed an offence under s 131 of the Act in failing to disclose his interest in contracts between the company and his sole-proprietorship firm of Jurukur Selatan. There was also an allegation by Mr Yai in his affidavit that he refused to sell certain property of the company to the respondent at a price unacceptable to Mr Yai, and it was not denied by the respondent, that Mr Yai made 'an extra income of RM542,600 for the company indirectly through the wholly owned subsidiary' in the sale of the property at a higher price. The respondent and Mr Yai traded unpleasant remarks, culminating in the respondent using his unfinished version of the four-letter word in his letter to Mr Yai of 17 June 1991. In this letter, there was mention of the respondent wanting to sell his shares in the company to Mr Yai, and the respondent wrote as follows:

> I would sell my shares at the price or RM2.50 per share to you if you would agree to sell me three units of double-storey terrace and two units of semi-detached workshops based on RM90 per sq ft of built-up area.

But the price of the shares could not be agreed upon. Considering the above factors and considering the fact that the respondent had suppressed the material evidence relating to his actual participation in the management of the company as stated earlier, we are of the opinion that the respondent had not come to court with clean hands to justify the winding up of the company on the just and equitable rule. Accordingly, we would hold that it is not just and equitable to wind up the company under s 218(1)(i) of the Act.

We therefore allow the appeal with costs here and below. The deposit to be refunded to the appellants.

Appeal allowed.

Reported by Jafisah Jaafar